

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA, and THE
OSAGE MINERALS COUNCIL,

Plaintiffs,

v.

OSAGE WIND, LLC; ENEL KANSAS, LLC;
and ENEL GREEN POWER NORTH
AMERICA, INC.,

Defendants.

Case No. 14-CV-704-JCG-JFJ

**DEFENDANTS' DEMONSTRATIVE PRESENTATION USED DURING
JULY 9, 2024 HEARING**

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3200 Mid-Continent Tower
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P.O. Box 2168
Albuquerque, NM 87103
(505) 848-1800

Dated: July 9, 2024

*Attorneys for Defendants Osage Wind, LLC,
Enel Kansas, LLC, and Enel Green Power
North America, Inc.*

In accordance with the Court's request at the July 9, 2024 hearing, Defendants hereby submit an electronic copy of their demonstrative presentation used during that hearing.

Dated: July 9, 2024

Respectfully submitted,

Gregg J. Costa, *pro hac vice*
GIBSON, DUNN & CRUTCHER LLP
811 Main Street, Suite 3000
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/s/ Ryan A. Ray
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(212) 351-4000

*Attorneys for Defendants Osage Wind, LLC,
Enel Kansas, LLC, and Enel Green Power North America, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2024, I electronically transmitted the attached Document to the Clerk of the Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of the Court will transmit a notice of Electronic Filing to the following ECF registrants:

Cathryn D. McClanahan
Nolan Fields IV
Stuart P. Ashworth
David McCullough
Jeffrey S. Rasmussen
Rollie Wilson

The following non-ECF registrants have been served by email:

Charles R. Babst, Jr.
Attorney-Advisor
United States Department of the Interior
Office of the Solicitor
Tulsa Field Solicitor Office
7906 East 33rd Street, Suite 1000
Tulsa, OK 74145-1308
(918) 669-7730
charles.babst@sol.doi.gov
Attorney for the United States of America

/s/ Ryan A. Ray
Ryan A. Ray

United States of America, et. al.
v.
Osage Wind, LLC, et. al.



1. What would Enel have paid OMC for the rocks if Enel had secured a permit?
2. When the trespass occurred in 2014, was Enel acting with the violence and bad faith needed to justify an unusual award of treble damages?

Plaintiffs Bear the Burden

- Plaintiffs “bear[] the burden of proving [their] damages by a preponderance of the evidence.” *Brown v. USA Truck Inc.*, 2013 WL 4848837, at *20 (W.D. Okla. Sept. 11, 2013), *aff’d*, 568 F. App’x 610 (10th Cir. 2014).
- Plaintiffs have burden to prove both compensatory damages and exemplary damages. *E.g.*, *Maxwell v. Samson Res. Co.*, 848 P.2d 1166, 1173 (Okla. 1993); *Nelson v. Am. Hometown Publ’g, Inc.*, 333 P.3d 962, 974 (Okla. Civ. App. 2014).

Oklahoma Law Governs Damages

Plaintiffs' statement of the monetary award they will seek at trial (which Defendants oppose) is as follows:

a. Conversion (value of the Osage Mineral Estate ("OME") plus fees and costs):

Pursuant to 23 Okla. Stat. § 64:

The detriment caused by the wrongful conversion of personal property is presumed to be:

1. The value of the property at the time of the conversion with the interest from that time; or,
2. Where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and,
3. A fair compensation for the time and money properly expended in pursuit of the property.

23 Okla. Stat. § 64.

Pre-Trial Order, pages 3-4

b. Trespass (value of a lease/trebled):

Generally, "[f]or the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not." 23 Okla. Stat. § 61. See Finnell v. Seismic, 67 P.3d 339, 345 n.29 (Okla. 2003). The United States has retained (and

• • • •

"For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is *three times* such a sum as would compensate for the detriment caused to him by the act complained of." 23 Okla. Stat. § 71 (emphasis added). Using the trespass damages itemized above, the trebling of such damages would result in the following awards:

No Thumb on the Scale for Tribe

- Plaintiffs' damages are governed by generally applicable Oklahoma tort law. *See, e.g., Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 969 (10th Cir. 2019) (applying Oklahoma trespass law).
- Plaintiffs fail to identify *any* portion of that law that “would frustrate specific objectives of...federal programs,” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991), or that singles out federal interests for uniquely hostile treatment, *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 594–97 (1973).

Continuing Trespass Remedied by Injunction

I. Declaration: Applicability & Violation of 25 C.F.R. § 211. Entered. Doc. 386 at 17-18.

II. Declaration: Applicability & Violations of 25 C.F.R. § 214. Entered. *Id.*

III. Trespass. **Liability found;** damages to be determined at trial. Doc. 386.

IV. Continuing Trespass. Liability found; injunctive relief to be entered. *Id.*

V. Conversion. **Liability found;** damages to be determined at trial. *Id.*

Plaintiffs' Pre-Trial Brief, page 1

Single Recovery for Single Harm

- “[N]o double recovery is allowed for the same injury.” *Houck v. Hold Oil Corp.*, 867 P.2d 451, 460–61 (Okla. 1993).
- Where “a single injury gives rise to more than one claim for relief, a plaintiff may recover his damages under any claim, but he may recover them only once.” *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1236, 1261–62 (10th Cir. 1988), *rev’d on other grounds, Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

Compensatory Damages

- “the amount which will compensate for all detriment proximately caused thereby.” *Kinetics Tech. Int’l Corp. v. Fourth Nat’l Bank of Tulsa*, 705 F.2d 396, 403 (10th Cir. 1983) (quoting 23 Okla. Stat. § 61).
- Goal is to place the injured party “as nearly as may be in the situation which he would have occupied had not the wrong been done.” *Id.* (quoting *Midland Valley R.R. v. Barton*, 129 P.2d 1007, 1010 (Okla. 1942)).
- “[A plaintiff] is to be made whole, but [is] not entitled to be put in a better condition than he would be in had the wrong not been committed.” *Stringer v. Dilger*, 313 F.2d 536, 541 (10th Cir. 1963).

Compensatory Damages

- What would Enel have paid OMC for the rocks if Enel had secured a permit?

Damages Experts

Enel

~ \$69,000

Plaintiffs

> \$30,000,000

Real-World Economics



X

Facts of the Case



X

Governing Law



X

John Pfahl



Steven Hazel



Credentials & Experience



- Over 20 years' experience in the mining industry
- Extensive experience valuing and negotiating mineral leases



- Accountant with background in tax
- No experience negotiating mineral leases

Methodology

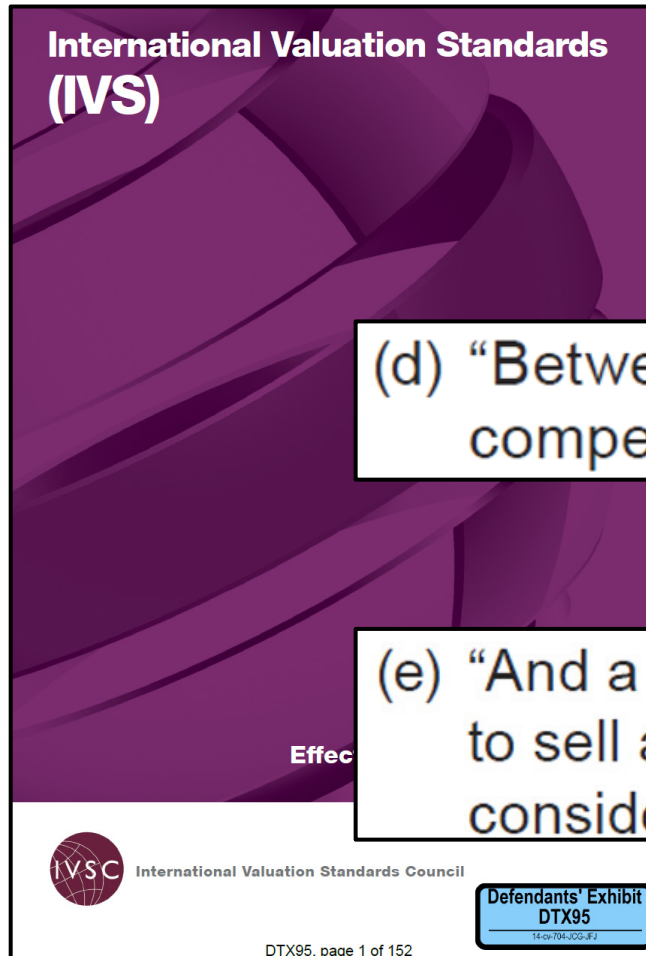


- Applied “market approach” to analyze the value owed for use of the Osage Mineral Estate
- Considered available comparable transactions between OMC and other parties



- Assumed an “unwilling seller”
- Assumed OMC could and would demand massive hold-up value, divorced from the value of the minerals
- Considered *surface* leases to be the right “comparables” for *mineral* leases

Hazel's Method Contradicts Settled Market Valuation Principles



30. IVS-Defined Basis of Value – Market Value

- 30.1. *Market value* is the estimated amount for which an asset or liability *should* exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.
- 30.2. The definition of *market value must* be applied in accordance with the following conceptual framework:
- • • •

(d) “Between a willing buyer” refers to one who is motivated, but not compelled to buy. This buyer is neither over-eager nor determined to

with the realities of the current market and with current market expectations, rather than in relation to an imaginary or hypothetical market that cannot be demonstrated or anticipated to exist. The assumed buyer would not pay a higher *price* than the market requires.

(e) “And a willing seller” is neither an over-eager nor a forced seller prepared to sell at any *price*, nor one prepared to hold out for a *price* not considered reasonable in the current market. The willing seller is

motivated to sell the asset at market terms for the best *price* attainable in the open market after proper marketing, whatever that *price may* be. The factual circumstances of the actual owner are not a part of this consideration because the willing seller is a hypothetical owner.

Hazel's Method Contradicts Settled Market Valuation Principles

- “[Mine] is not a willing buyer / willing seller analysis.” Tr. 350:11-351:5.
- “Q. And you think it’s appropriate in making a market valuation to consider the subjective resistance of the seller to negotiating a price? A. Absolutely.” Tr. 269:20-23.
- “Q. So you couldn’t assume that I say ‘Oh, I wouldn’t have sold that...unless I got a million dollars,’ right? That wouldn’t factor into the valuation? A. If that's the facts and circumstances that [you] say[] that, then maybe it's worth a million dollars.” Tr. 271:23-272:3.

Hazel's Method Contradicts Settled Market Valuation Principles



20. Market Approach

- 20.1. The market approach provides an indication of *value* by comparing the *asset* with identical or comparable (that is similar) *assets* for which price information is available.

Hazel's Method Contradicts Settled Market Valuation Principles

- In choosing “comparables,” Hazel disregarded the OMC *mineral* leases, in favor of non-OMC *surface* leases. Tr. 281:25–282:10.
- But Hazel could not identify a *single* mining lease that provided for the sorts of payments provided in the surface leases. Tr. 342:7–345:17.
- Nor could Hazel identify a *single* instance in which he had opined “that a mineral estate should be valued the exact same as the surface estate that’s adjacent to it.” Tr. 244:11–245:13.
- Plaintiffs’ other expert, Robert Freas, also testified that he had never used a surface lease as a comparable to value minerals. Tr. 102:4–7, 103:7–13, 106:8–15.

Facts of the Case



- Considered all relevant facts, including OMC's other transactions and the availability of offsite backfill



- Ignored OMC's mineral leases with other parties
- Ignored the availability of alternative backfill

Hazel Ignores Key Relevant Facts

- Beyond dispute that Enel could have sourced alternative backfill.
E.g., Tr. 1404:16–23, 1411:17–1415:4 (Price); PX 31, PX 37.
- Hazel ignores this fact, which undermines the entire premise of his conclusions—that OMC “would have negotiated” massive hold-up value because Enel had no other choice.
E.g., Tr. 189:23–190:9, 216:8–217:7 (Hazel).

Governing Law



- Based his calculations on the amount of minerals “mined” under the Tenth Circuit’s interpretation of 25 C.F.R. Part 214



- Assumed that, as surface owner, Enel had *no rights whatsoever* to enter the subsurface
- Assumed that OMC therefore could have prevented construction of the Project
- Ignores methodology reflected in 25 C.F.R. Part 214

Hazel's Opinion Is Divorced from the Governing Law

- Hazel wrongly assumed that Enel needed a mineral lease to “go into the subsurface” at all. Tr. 313:13–22
- “[I]t’s the same land, it’s just one above the ground and one below the ground basically. So if you have to have the ability to build the turbines and you have to go in the subsurface, you have to basically work with the mineral owners because they’re just as integral as the surface owners. **They have to have both people sign off, if you want to call it that, to basically build this particular property.**” Tr. 186:2–17 (emphasis added).



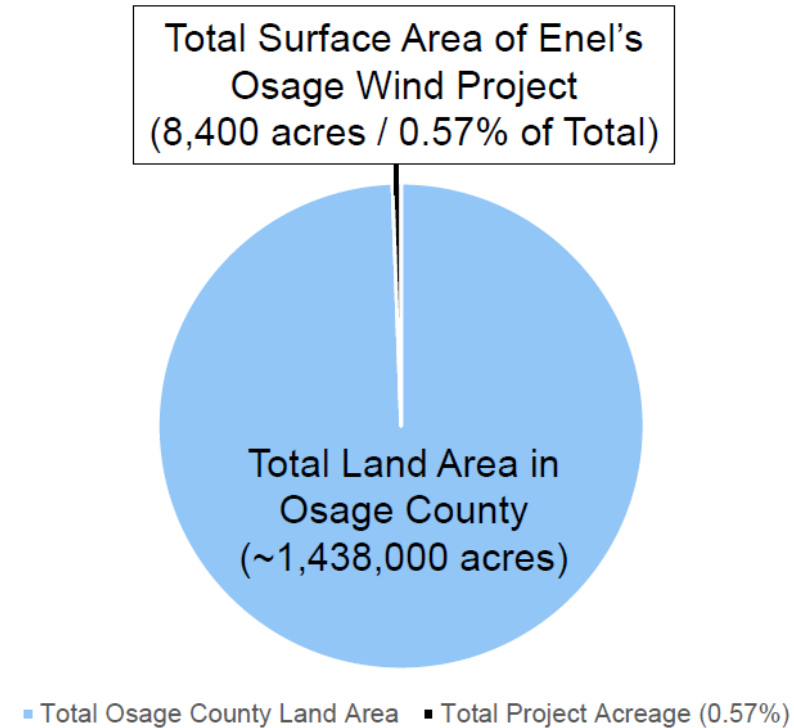
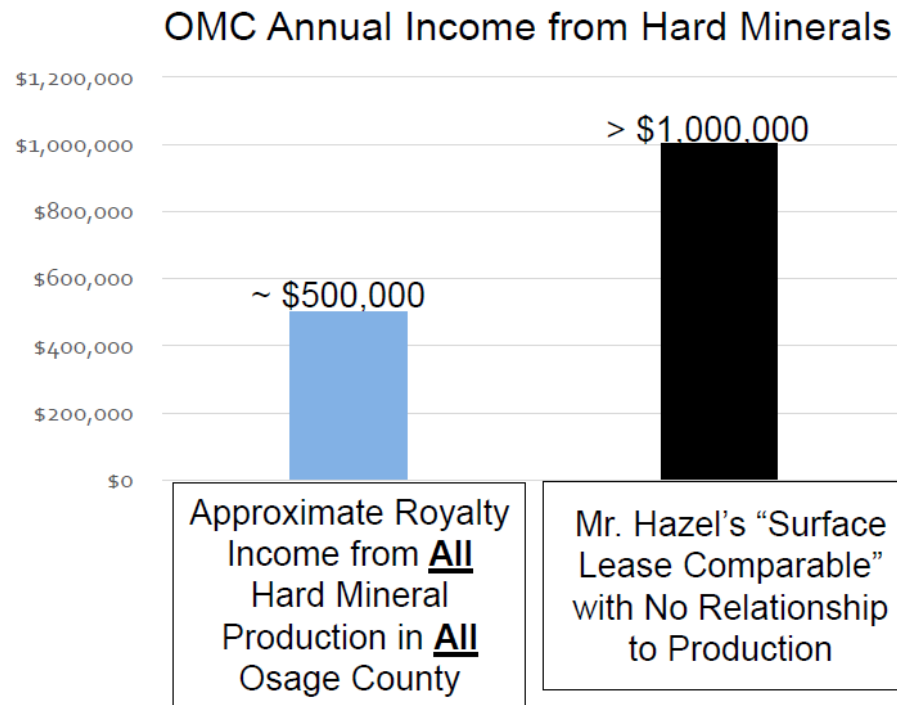
- Recognized Methodology
- Tethered to the Facts
- Tethered to the Law
- Reasonable Results



- Invalid Methodology
- Untethered from the Facts
- Untethered from the Law
- Absurd Results

Hazel's Opinion Leads to Absurd Results

Mr. Hazel's Valuation in Context



DX 102

Top 10 Reasons Hazel's Opinion Is Unreliable

10. Ignores Methodology Reflected in 25 C.F.R. Part 214
9. Ties Damages to the Value of Surface Leases, Even Though Mining Occurred Beneath Less than 1% of the Leased Land
8. Divorced from Court Rulings on What Constitutes “Mining”

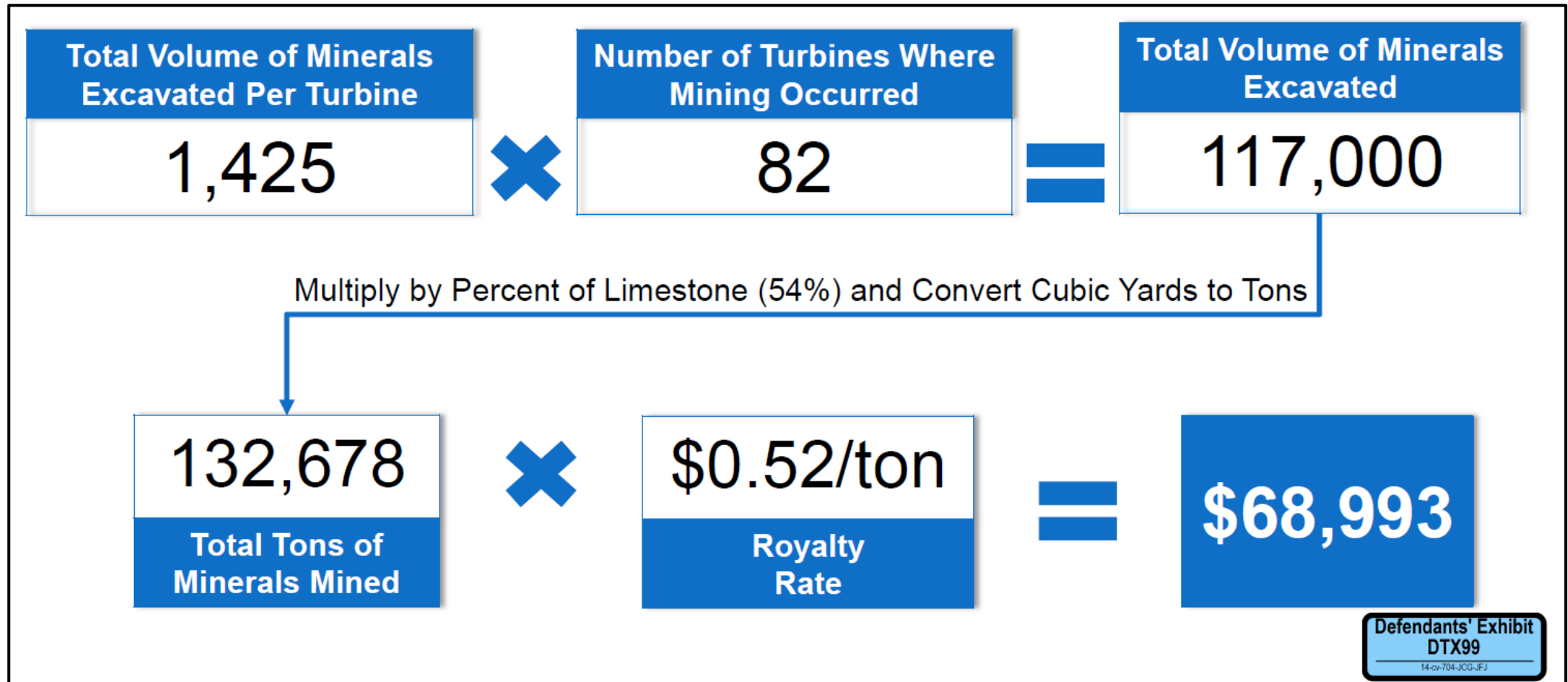
7. Instead of “Willing Seller,” Assumes Recalcitrant Seller
6. Instead of “Willing Buyer,” Assumes Forced Buyer
5. Ignores that Enel Could Have Bought Backfill from Nearby Quarry

4. Values the Lease at More than 100x the Value of the Minerals Mined
3. Values the Lease at More than All Mining Royalties Annually Paid in Osage County
2. Disregards Nearly Identical, Real-World Mining Leases

- 1. Not a Single Real-World Example that Uses Surface Leases as a Proxy for Mining Leases**

Pfahl's Damages Calculation Is Reliable

Pfahl's Damages Calculation



Freas' Similar Calculation Is Inflated

- Wrongly assumed that “any material that was excavated from the ground,” whether or not “subjected to any kind of treatment,” had been “mined.” Tr. 117:12–118:10, 120:12–121:5.
- Ignored royalty rates from contemporaneous OMC leases. Tr. 133:19–134:25, 136:7–137:4.
- Applied incorrect slope ratio. Tr. 128:20–129:7, 130:4–24.

**Plaintiffs' Compensatory
Damages Are \$68,993**

Treble Damages

No Basis for Treble Damages

Plaintiffs must prove that Enel:

- ① acted with “malice” or bad faith; and
- ② dispossessed Plaintiffs from “real property” with “violence” or “active force.”

No Basis for Treble Damages

Plaintiffs must prove that Enel:

- 1** acted with “malice” or bad faith; **and**
- 2 dispossessed Plaintiffs from “real property” with “violence” or “active force.”

No Evidence of “Evil Intent”

“The act which constitutes the cause of action must be actuated by or accompanied with some ***evil intent***, or must be the result of ***such gross negligence*** – such as disregard to another’s rights – as it is ***deemed equivalent to such intent.***”

Dilworth v. Fortier, 405 P.2d 38, 45 (Okla. 1964); *Edwards v. Lachman*, 534 P.2d 670, 673 (Okla. 1974).

What Plaintiffs Failed to Show

- 1 Any evidence Enel acted with malice
- 2 Any evidence of reckless or wanton oppression by Enel
- 3 Any belief of Enel during construction of the wind farm (or anytime prior to the Tenth Circuit ruling) that a mining lease was required

What The Evidence Actually Showed

- 1 Enel's consistent effort to comply with the law
- 2 Enel's reliance on a reasoned legal opinion
- 3 Enel's controlled, routine, and typical construction process
- 4 Enel's repeated efforts to address BIA's and OMC's concerns



Modrall Understands Project Would Use Customary Excavation and Construction Processes and No Excavated Material Would Be Removed and/or Sold

To: Aaron Weigel (aweigel@tradewindenergy.com) [aweigel@tradewindenergy.com] (DWeigel@Polsinelli.com) [DWeigel@Polsinelli.com]; Matt (matt@tradewindenergy.com) [matt@tradewindenergy.com] (SWillman@Polsinelli.com) [SWillman@Polsinelli.com] (rfreeman@tradewindenergy.com) [rfreeman@tradewindenergy.com]

From: Bill C. Scott

Sent: Tue 10/15/2013 8:46:34 PM

Subject: Draft Response to Osage Minerals Council request for information

Draft response to Osage Minerals Council request for information

;;
Gentlemen,
I have attached for your review a draft of a response to the Osage Minerals Council and the Principal Chief of the Osage Nation dated July 19, 2012 letter from David Boyce to the United States "enclosed transmittal letter," but we have not seen it. We look forward to your comments on the attached draft.

MODRALL SPERLING
William C. Scott
Modrall Sperling | www.modrall.com
P.O. Box 2168 | Albuquerque, NM 87103-2168
505.448.1824 | O: 505.848.1800 | F: 505.848.1824

Mr. Andrew Yates
Chairman, Osage Minerals Council
P.O. Box 779
Pawhuska, OK 74056

Via Priority Mail

Re: Your October 10, 2013 Letter

Dear Mr. Yates:

Thank you for your October 10, 2013 letter. This responds on behalf of Wind Capital Group and Trade Winds Energy, Inc. [will the letter respond for companies?] to your request for information regarding whether the planned construction activities for the Osage wind energy project (the "Project") require mineral permitting or leasing by the Bureau of Indian Affairs, given the reserved mineral estate held for the Osage Nation. Neither a mineral lease nor any BIA permit is required for the construction work that will occur on the privately owned fee lands involved in constructing the Project. The Project involves the construction and subsequent operation of wind facilities for the generation of electricity. The Project is not a removal from the Project site of, or commercial sale of any

In connection with the construction of the turbines and underground collector lines. The location of the turbines and of project plans that were delivered to the Osage Minerals Council office on 10/15/2013. This excavation work will be below ground surface. Wind Capital Group and TradeWinds Energy, Inc. [will the letter respond for both companies?] are not aware that any site subject to excavation contains any commercially valuable mineral deposit at such shallow depths. Moreover, all excavated material will be temporarily stored on site and will be used on site as backfill which will be compacted. No excavated material will be removed from the Project site and no excavated material will be processed. If sand, gravel, or other mineral materials are required for purchase and bring in materials from off-site vendors.

As demonstrated during the course of the hearing before the acting through the Osage Mineral Council v. Wind Capital Group, Inc., the Project is made from reinforced concrete, with each foundation initially below the surface, then expanding in a conical shape with a maximum diameter of 30 feet, to a depth of 10 feet." Findings of Fact and Conclusions of Law, ¶ 8. Backhoes and other customary construction equipment will be used for the excavation and backfilling work.

We trust that this addresses your request for information.

¹ As Wind Capital Group explained in its August 10, 2012 response to the United States Department of the Interior, Bureau of Indian Affairs' July 19, 2012 letter, those same detailed project plans were delivered to the BIA and were made public as part of the Osage County Planning and Zoning hearings on the application for the Conditional Use Permit.

Cc: Lynn H. Slade[lynn.slade@modrall.com]
From: Bill C. Scott
Sent: Tue 10/15/2013 8:46:34 PM

10 feet." Findings of Fact and Conclusions of Law, ¶ 8. Backhoes and other customary construction equipment will be used for the excavation and backfilling work.

site and will be used on site as backfill which will be compacted. No excavated material will be removed from the Project site and no excavated material will be processed (on site or off site) for commercial sale.

DTX96, page 2 of 3

OSAGE WIND PRIV-000364

Defendants' Exhibit
DTX96
10/15/2013

OSAGE WIND PRIV-000363

DX 96 at 2

DTX96, page 1 of 3

DX 48 at 4-5

41

Enel Incorporates Modrall's Advice Into Its Construction Plan

To: Andrew Landoll[alandoll@tradewindenergy.com]; Aaron Weigel[aweigel@tradewindenergy.com]
Cc: Lincon, Nick (EGP North America)[Nick.Lincon@enel.com]; Hickey, Christopher (EGP North America)[Christopher.Hickey@enel.com]; Ritter, Ron[Ritter@lea.net]; Welch, Mike[Mike.Welch@rmtinc.com]; Mazurowski, Craig[Craig.Mazurowski@rmtinc.com]; Champagne, Steve (EGP North America)[Steve.Champagne@enel.com]; Jennifer Dean[jdean@tradewindenergy.com]; DiMarzio, Giuseppe (EGP North America)[Giuseppe.DiMarzio@enel.com]; Daters, Daren (EGP North America)[Daren.Daters@enel.com]; Hameed, Khawar (EGP North America)[Khawar.Hameed@enel.com]
From: Heredia, Joan (EGP North America)
Sent: Thur 5/22/2014 7:32:26 PM
Subject: RE: Osage Wind

Perfect Thanks! Just being cautious.

From: Andrew Landoll [mailto:alandoll@tradewindenergy.com]

Sent: Thursday, May 22, 2014 12:30 PM

To: Aaron Weigel

Cc: Heredia, Joan (EGP North America); Lincon, Nick (EGP North America); Hickey, Christopher (EGP North America); Ritter@lea.net; Welch, Mike (Mike.Welch@rmtinc.com); Mazurowski, Craig (Craig.Mazurowski@rmtinc.com); Champagne, Steve (EGP North America); Jennifer Dean; DiMarzio, Giuseppe (EGP North America); Daters, Daren (EGP North America)

Subject: Re: Osage Wind

This is for aggregate provided by the quarry.

Andrew Landoll

On May 22, 2014, at 14:23, "Aaron Weigel" <aweigel@tradewindenergy.com> wrote:

Ron/Mike/Craig,

It is my understanding that the sieve analysis is on aggregate that's coming from the quarry, but as Joan suggests below, please confirm that's the case. It is very important that we not remove ANY soil from the project site or use site materials in lieu of materials we would typically buy off site in developing a wind project. Osage Nation has mineral rights for the project lands and removal of soil especially for commercial gain could constitute mining. I know that sometimes subcontractors make side deals with landowners and we need to be very careful about not removing or selling soil. For foundations, roads, etc. it is ok to backfill or reposition soils on the site. But, for example, we should not mix site materials into concrete, if the material is something we would typically buy from a vendor.

Please make sure this message is widely communicated to any subcontractors working on the project.

Aaron

From: Heredia, Joan (EGP North America) [mailto:Joan.Heredia@enel.com]

Sent: Thursday, May 22, 2014 2:17 PM

To: Aaron Weigel; Lincon, Nick (EGP North America); Hickey, Christopher (EGP North America)

Cc: Champagne, Steve (EGP North America); Jennifer Dean; DiMarzio, Giuseppe (EGP North America); Daters, Daren (EGP North America)

Subject: FW: Osage Wind

Aaron,

On May 22, 2014, at 14:23, "Aaron Weigel" <aweigel@tradewindenergy.com> wrote:

Ron/Mike/Craig,

It is my understanding that the sieve analysis is on aggregate that's coming from the quarry, but as Joan suggests below, please confirm that's the case. It is very important that we not remove ANY soil from the project site or use site materials in lieu of materials we would typically buy off site in developing a wind project. Osage Nation has mineral rights for the project lands and removal of soil especially for commercial gain could constitute mining. I know that sometimes subcontractors make side deals with landowners and we need to be very careful about not removing or selling soil. For foundations, roads, etc. it is ok to backfill or reposition soils on the site. But, for example, we should not mix site materials into concrete, if the material is something we would typically buy from a vendor.

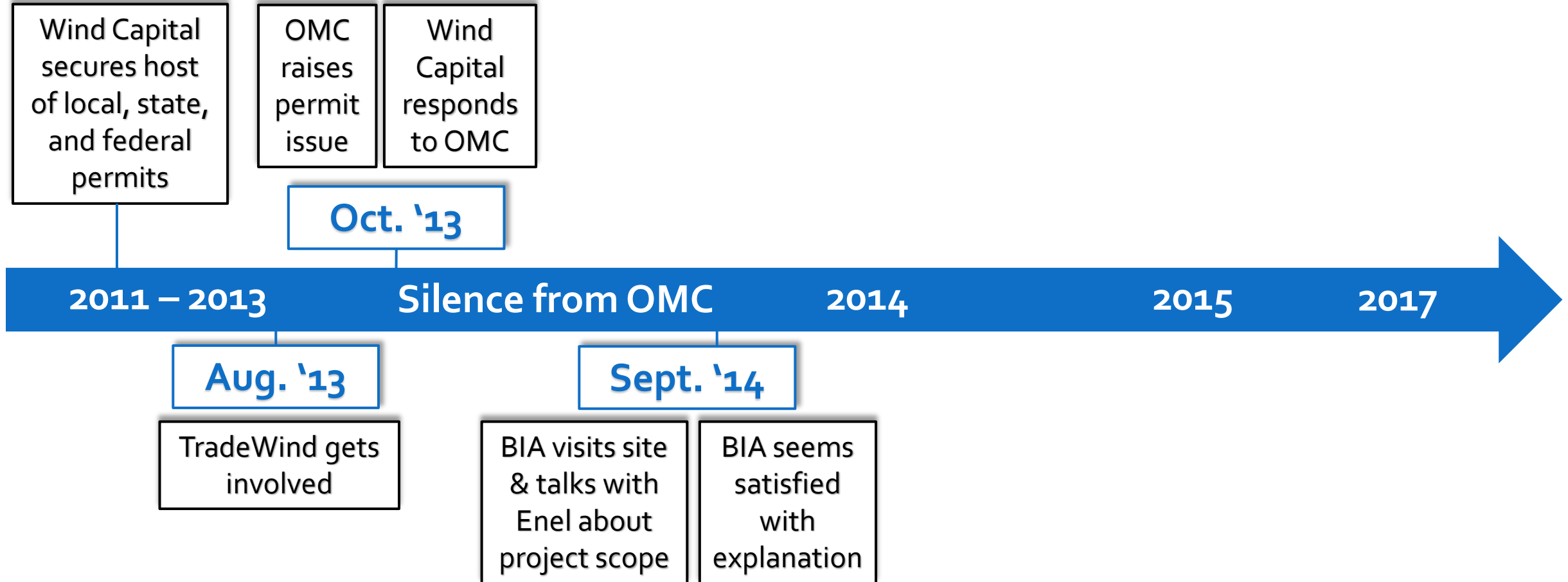
Please make sure this message is widely communicated to any subcontractors working on the project.

Aaron

Defendants' Exhibits
DX17

14-cv-704-JCG-JFJ

OSAGE WIND-024749



September 2014 Site Visit by BIA Inspector Whiteshield

To: Aaron Weigel[aweigel@tradewindenergy.com]; Lincon, Nick (EGP North America)[Nick.Lincon@enel.com]; Champagne, Steve (EGP North America)[Steve.Champagne@enel.com]; Steve Willman (swillman@dfglaw.com) [swillman@dfglaw.com]; Bill C. Scott (bcsott@modrall.com)[bcsott@modrall.com]; Hickey, Christopher (EGP North America)[Christopher.Hickey@enel.com]; Matt Gilhousen[matt@tradewindenergy.com]; Jennifer Dean[jdean@tradewindenergy.com]
Cc: Price, Bill (EGP North America)[Bill.Price@enel.com]; Moskaluk, Bill (EGP North America)[Bill.Moskaluk@enel.com]; Daters, Daren (EGP North America)[Daren.Daters@enel.com]; DiMarzio, Giuseppe (EGP North America)[Giuseppe.DiMarzio@enel.com]
From: Heredia, Joan (EGP North America)
Sent: Wed 10/1/2014 12:40:37 AM
Subject: RE: Osage - Mineral Rights

Osage Team,

I spoke with Ray Whiteshield at the BIA today, very nice man, he has been on the job for 5 months. He was told to inquire as one of the Osage council members saw the rock crusher and assumed we may be crushing rock for sale. I explained to him that it is rock out of a foundation hole, but due to the rocky nature of the material we have to crush it to put it back in the hole. No sale to external sources, as we are aware of the need to not infringe on Osage Nation Mineral Rights. I did explain briefly that the Osage is very protective of their oil and gas operations, but that wind and oil and gas can coexist as we do at many of our sites. I explained we have reached out to the BIA and Osage Nation many times in the past. I invited him to come to the site, but he declined as he felt comfortable with my explanation. He noted that Robin Phillips is the new Acting Regional Director and that we should send a follow up letter simply clarifying that we are not selling the material, merely crushing and returning to the foundation hole.

I asked Chris Hickey to set up a brief call with Modrall tomorrow.

My suggestion is the site can carry on. But we should take care,

Joan Heredia
 Director, Environmental Compliance and Regulatory
 Enel Green Power North America, Inc.



3636 Nobel Drive #475
 San Diego CA 92122

T +1 619 507 4130

Joan.Heredia@enel.com

From: Heredia, Joan (EGP North America)
Sent: Wed 10/1/2014 12:40:37 AM
Subject: RE: Osage - Mineral Rights

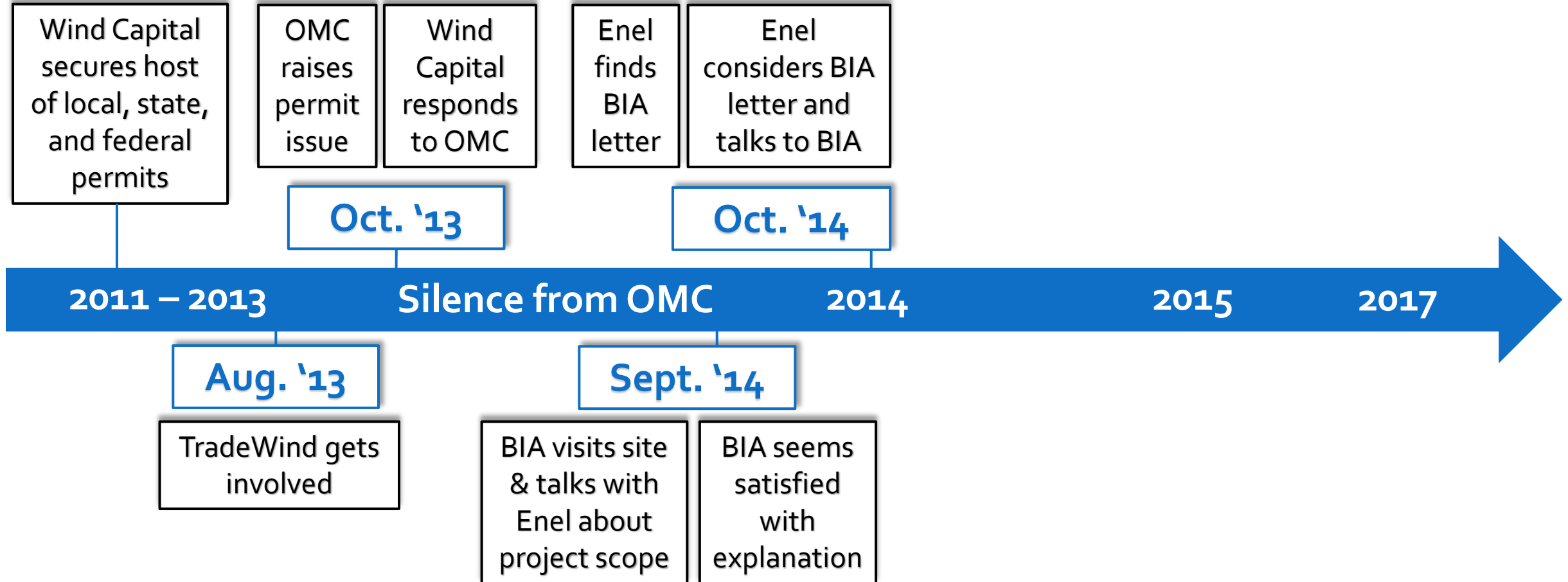
I spoke with Ray Whiteshield at the BIA today, very nice man, he has been on the job for 5 months. He was told to inquire as one of the Osage council members saw the rock crusher and assumed we may be crushing rock for sale. I explained to him that it is rock out of a foundation hole, but due to the rocky nature of the material we have to crush it to put it back in the hole. No sale to external sources, as we are aware of the need to not infringe on Osage Nation Mineral Rights. I did explain briefly that the Osage is very protective of their oil and gas operations, but that wind and oil and gas can coexist as we do at many of our sites. I explained we have reached out to the BIA and Osage Nation many times in the past. I invited him to come to the site, but he declined as he felt comfortable with my explanation. He noted that Robin Phillips is the new Acting Regional Director and that we should send a follow up letter simply clarifying that we are not selling the material, merely crushing and returning to the foundation hole.

Defendants' Exhibits
 DX35
 14-cv-704-JCG-JFJ

OSAGE WIND PRIV-000090

DX35, page 1 of 2

DX 35



Enel's Outreach to BIA Regarding Project Site Activities

Jennifer Dean

From: Lynn H. Slade <lynn.slade@modrall.com>
Sent: Friday, October 17, 2014 3:58 PM
To: Heredia, Joan (EGP North America); Steven C. Willman (swillman@dfrglaw.com); Jennifer Dean; Champagne, Steve (EGP North America) (Steve.Champagne@enel.com); Matt Gilhouse
Cc: Bill C. Scott
Subject: FW: Osage Wind Construction Activity
Attachments: Ltr. WCG to OMC 10-28-13 re. Mineral permit (W2152054).PDF; Whiteshield 10-10-14 (W2291717).PDF

Joan, et al., this forwards my email to Alan Woodcock after our call today. I explained what Osage Wind is doing, and not doing, related the course of communications on this subject, as described in the email below, and outlined the law we believe applies to enable the surface owner to authorize our activities, and that no permit or lease is required. He said he is happy to receive this information, as he is scheduled to be in a meeting on Tuesday on this subject, which I understand will include BIA officials and possibly Osage officials. He said he does want the facts pertaining to the issue.

I offered to send him a memo outlining the facts and law, and he stated that would be helpful, and that it would be helpful to receive it Monday morning. I committed to do so, as stated in the email below.

I have spoken with Bill, and he will prepare a draft memo and forward it for review in time for us to deliver to Woodcock Monday morning.

Please raise any questions you may have (and please forward to others not on this distribution who should receive it.

Regards,

Lynn

From: Lynn H. Slade
Sent: Friday, October 17, 2014 2:48 PM
To: 'alan.woodcock@sol.doi.gov'
Cc: Bill C. Scott
Subject: Osage Wind Construction Activity

Alan: this follows our call today and provides the two documents I promised:

- October 28, 2013 Letter, David Boyce, Wind Capital Group to Mr. Andrew Yates, Chairman, Council, with copy to Robin Phillips, BIA, explaining why Osage Wind does not believe its activities of the mineral estate owner and no mineral lease or permit is required. To Osage Wind had not been advised before last week that the Minerals Council or BIA disagree
- October 10 letter to Robin Phillips, Acting Superintendent, Osage Agency, BIA, explaining the materials removed and replaced on the surface estate.

As we discussed, we will forward a memo to you Monday morning stating the facts pertaining to Osage Wind in greater detail than set out in the correspondence attached, and summarizing the law we believe supports the right of the surface owner to authorize this construction activity.

Regards,

From: Lynn H. Slade <lynn.slade@modrall.com>
Sent: Friday, October 17, 2014 3:58 PM

Joan, et al., this forwards my email to Alan Woodcock after our call today. I explained what Osage Wind is doing, and not doing, related the course of communications on this subject, as described in the email below, and outlined the law we believe applies to enable the surface owner to authorize our activities, and that no permit or lease is required. He said he is happy to receive this information, as he is scheduled to be in a meeting on Tuesday on this subject, which I understand will include BIA officials and possibly Osage officials. He said he does want the facts pertaining to the issue.

I offered to send him a memo outlining the facts and law, and he stated that would be helpful, and that it would be helpful to receive it Monday morning. I committed to do so, as stated in the email below.

I have spoken with Bill, and he will prepare a draft memo and forward it for review in time for us to deliver to Woodcock Monday morning.

Please raise any questions you may have (and please forward to others not on this distribution who should receive it.

Regards,

Lynn

1

DX59, page 1 of 7

Defendants' Exhibits
DX59
14-cv-704-JCG-JFJ

OSAGE WIND-005906

DX 59

46

Modrall Solicits Input From Enel's Construction Team To Ensure Accuracy of Facts Communicated to BIA

From: Bill C. Scott [mailto:bscott@modrall.com]
Sent: Friday, October 17, 2014 1:47 PM
To: Tierney, Mike (EGP North America)
Cc: Lynn H. Slade
Subject: Draft Statement of Facts re: Construction Activity

To: Bill C. Scott [mailto:bscott@modrall.com]
Cc: DiMarzio, Giuseppe (EGP North America) [mailto:Giuseppe.DiMarzio@enel.com]; Mike Tierney [mailto:mike.tierney@enel.com]; Lynn H. Slade [mailto:lynn.slade@modrall.com]
From: Price, Bill (EGP North America)
Sent: Sat 10/18/2014 3:44:34 PM
Subject: Re: Draft Statement of Facts re: Construction

Currently we have 3 portable rock crushers in operation and they will go from together as needed. We shouldn't require more than the three if we are allowed Bill

On Oct 18, 2014, at 8:25 AM, "Bill C. Scott" <bscott@modrall.com>mailto:bscott@modrall.com>

Just to make sure - is there a single rock crusher that is being moved from one site to another or are there two or more crushers on the project site which may be open within the project site? If there is more than one crusher, please let us know if been on the site at any time, the current number of crushers on site, and whether simultaneously at different locations on the project site. Thanks.

<image001.jpg>http://www.modrall.com/>
William C. Scott
Modrall Spertling | www.modrall.com/http://www.modrall.com/>
P.O. Box 2168 | Albuquerque, NM 87103-2168
500 4th St. NW, Ste. 1000 | Albuquerque, NM 87102
D: 505.848.1824 | O: 505.848.1800 | F: 505.848.9710

From: DiMarzio, Giuseppe (EGP North America) [mailto:Giuseppe.DiMarzio@enel.com]
Sent: Friday, October 17, 2014 5:13 PM
To: Tierney, Mike (EGP North America); Price, Bill (EGP North America)
Cc: Bill C. Scott; Lynn H. Slade
Subject: RE: Draft Statement of Facts re: Construction Activity

Mike,
The WTG foundation details are correct.
I would mention that we might need to crush rocks for cable trenching backfill (90 ft foot print).
Thanks
Giuseppe

From: Tierney, Mike (EGP North America)
Sent: Friday, October 17, 2014 2:27 PM
To: DiMarzio, Giuseppe (EGP North America); Price, Bill (EGP North America)
Cc: Bill C. Scott; Lynn H. Slade
Subject: RE: Draft Statement of Facts re: Construction Activity

Forgot to replace one of the "Enel's" with "Osage Wind's". Please do so when

From: Tierney, Mike (EGP North America)
Sent: Friday, October 17, 2014 2:25 PM
To: DiMarzio, Giuseppe (EGP North America); Price, Bill (EGP North America)
Cc: "Bill C. Scott"; Lynn H. Slade
Subject: FW: Draft Statement of Facts re: Construction Activity

Bill & Giuseppe,

Please review the excerpt below as soon as possible and provide your comments to me, counsel on the cc line and Joan.

Thanks for your quick review and attention.

Regards,

Mike

From: Bill C. Scott [mailto:bscott@modrall.com]
Sent: Friday, October 17, 2014 1:47 PM
To: Tierney, Mike (EGP North America)
Cc: Lynn H. Slade
Subject: Draft Statement of Facts re: Construction Activity

Mike,

We are adding a statement of facts to the memo that will go to Alan Woodcock, which is based on our understanding from our telephone calls on this matter. Can you please review the statement and perhaps have your construction folks take a quick look to make sure that our description is accurate. We want to fold this in the memo as soon as possible so that we can have the memo to Woodcock by first thing Monday morning. I look forward to your comments.

Factual Background

Osage Wind, LLC, an indirect, wholly-owned subsidiary of Enel North America, LLC, holds leases of non-Indian owned surface estate in Osage County, Oklahoma, for the construction and operation of a wind farm facility. Osage Wind, LLC, is currently excavating foundations for the wind turbines and associated buildings and structures. I suggest modifying this sentence as follows in case the excavation for the foundations for the wind turbines are the largest excavations on the site. Rock from these excavations are used as backfill. Enel's contractor has a rock crusher on site which crushes the rock to a roughly 1/2 inch size. The rock is crushed and placed immediately next to the site from which it was excavated. This is a customary and standard construction practice. Once the foundations are poured and have cured, the crushed rock, sand and soil from the excavation are pushed back into the excavated site as backfill.

None of the rock, sand or soil excavated from any foundation project or outside of the project area. No rock, sand or soil is backfilled the excavation from which it came. No excavated rock is used for any other purpose. All sand, aggregate and concrete is instead area and is delivered by truck to the project site.

Any U.S. federal tax advice contained herein (including any attachments), unless specifically stated otherwise, is not intended or written to be used, and cannot be used, for the purposes of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another individual.

Modrall, Spertling, Roth, Harris & Sisk, P.A. THIS MESSAGE IS INTENDED TO BE TRANSMITTED TO THE ADDRESSEE ONLY. IT MAY CONTAIN INFORMATION THAT IS CONFIDENTIAL, EXEMPT FROM DISCLOSURE UNDER ATTORNEY-CLIENT PRIVILEGE, OR OTHERWISE PROTECTED BY LAW. IF YOU ARE NOT THE ADDRESSEE, YOU SHOULD NOT DISSEMINATE, COPY, OR ACT ON THE CONTENTS OF THIS MESSAGE. If you have received this message in error, please notify the sender by e-mail and delete the message from your system without copying it, and notify the sender if you are not the intended recipient, you are hereby notified that any review, copying, distribution, or other use of this information is strictly prohibited. If you have received this message in error, please notify the sender by e-mail and delete the message from your system without copying it, and notify the sender if you are not the intended recipient, you are hereby notified that any review, copying, distribution, or other use of this information is strictly prohibited.

This email was Anti Virus checked by Astaro Security Gateway

Mike,

We are adding a statement of facts to the memo that will go to Alan Woodcock. A draft of that statement is set forth below which is based on our understanding from our telephone calls on this matter. Can you please review the statement and perhaps have your construction folks take a quick look to make sure that our description is accurate. We want to fold this in the memo as soon as possible so that we can have the memo to Woodcock by first thing Monday morning. I look forward to your comments.

50 and 60 feet in diameter. Rock from these excavations comes out in pieces of varying size and shapes. To return the rock to the excavation as backfill, Enel's contractor has a rock crusher on site which crushes the rock to a roughly 1/2 inch size. The rock is crushed and placed immediately next to the site from which it was excavated. This is a customary and standard construction practice. Once the foundations are poured and have cured, the crushed rock, sand and soil from the excavation are pushed back into the excavated site as backfill.

OSAGE WIND PRIV-000604

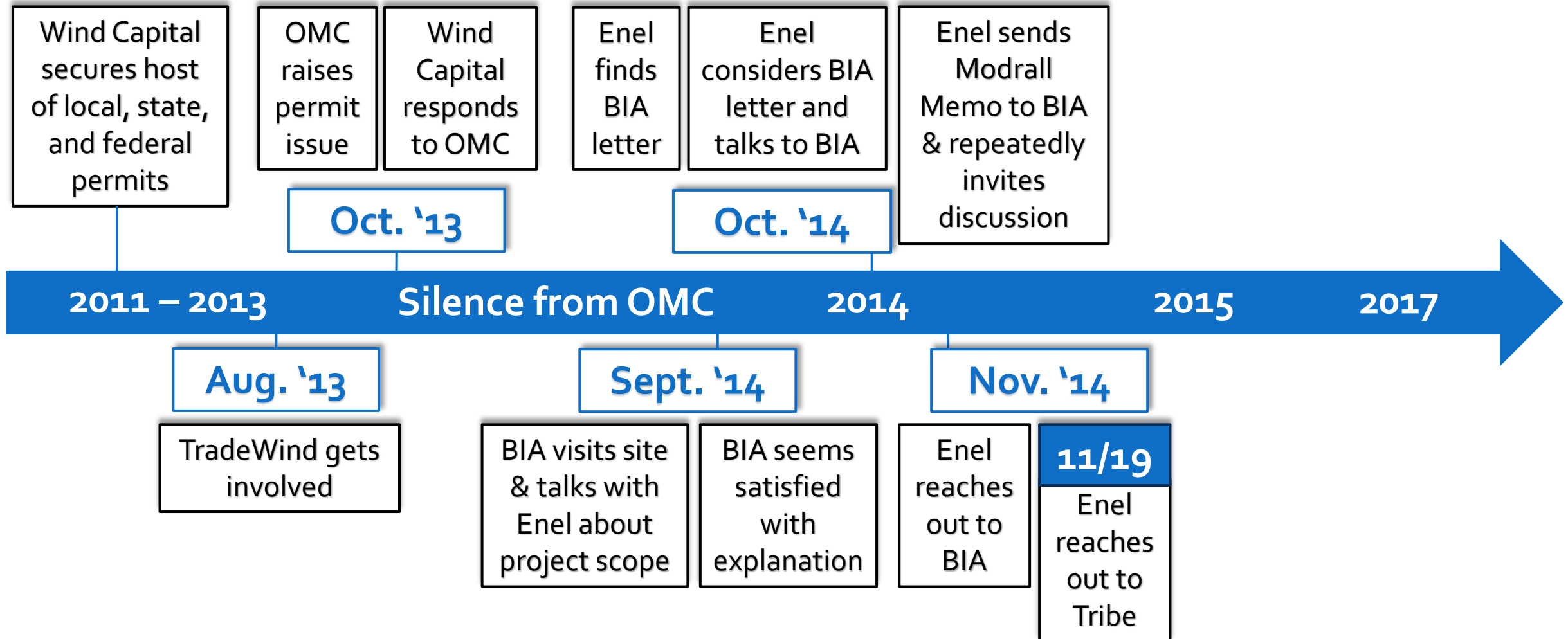
DX57, page 2 of 3

Defendants' Exhibits
DX57
14-00000000-00000000

OSAGE WIND PRIV-000603

DX57, page 1 of 3

DX 57



Enel Attempts to Meet with Tribe to Address Its Concerns



Osage Wind, LLC
a subsidiary of
Enel Green Power North America, Inc.
One Tech Drive - Suite 220
Andover - Massachusetts 01810 - USA
T +1 978 681 1900 - F +1 978 681 7727

November 19, 2014

THE HONORABLE GEOFFREY STANDING BEAR
PRINCIPAL CHIEF OF THE OSAGE NATION
627 GRANDVIEW AVENUE
PAWHUSKA, OK 74056

Dear Principal Chief Standing Bear:

It is with respect that I am writing to follow up on a series of meeting requests over the last several months on behalf of Enel Green Power North America, Inc. (EGP-NA) and its ownership interests in Osage Wind, LLC (Osage Wind).

As you are aware, Osage Wind holds certain leases of non-Osage Nation owned fee surface lands in Osage County and has leased these properties for the construction and operation of a state-of-the-art 150 MW wind farm. These leases will provide royalty payments to the surface rights land owners that in turn will help fuel additional economic growth within Osage County and the surrounding communities, including the Osage Nation.

Please be assured we are aware of Osage Nation concerns about the project, including mineral rights and wildlife protection. We would appreciate the opportunity to talk with you and explain how we are taking the concerns of the Osage Nation and broader community into consideration as we build and operate the project.

TradeWind Energy, LLC (TradeWind), EGP-NA's development partner, has attempted several times, directly and through emissaries, to schedule a meeting with you since your election in June of this year to introduce EGP-NA as the new project Managing Member and to brief you on Osage Wind.

We believe that this kind of communication is helpful in ensuring that we avoid misunderstandings and, more importantly, that we better understand each other's concerns and objectives in ways that can help us find common ground. This kind of communication will help ensure that projects like Osage Wind are constructed in harmony with local interests and the environment.

EGP-NA and TradeWind have worked diligently in developing the Osage Wind project to comply with existing laws and to minimize impacts in the project area stemming from construction as well as from operations once the project is in full service. As we do with every project, we have also striven to create value for the local community. We have been in regular communication with the local, state, and federal officials and regulators and hope to do the same with you.

Defendants' Exhibits
DX25
Mex-164-305-JFJ

OSAGE WIND-021117

DX25, page 1 of 2

DX25, page 2 of 2

November 19, 2014

THE HONORABLE GEOFFREY STANDING BEAR
PRINCIPAL CHIEF OF THE OSAGE NATION
627 GRANDVIEW AVENUE
PAWHUSKA, OK 74056

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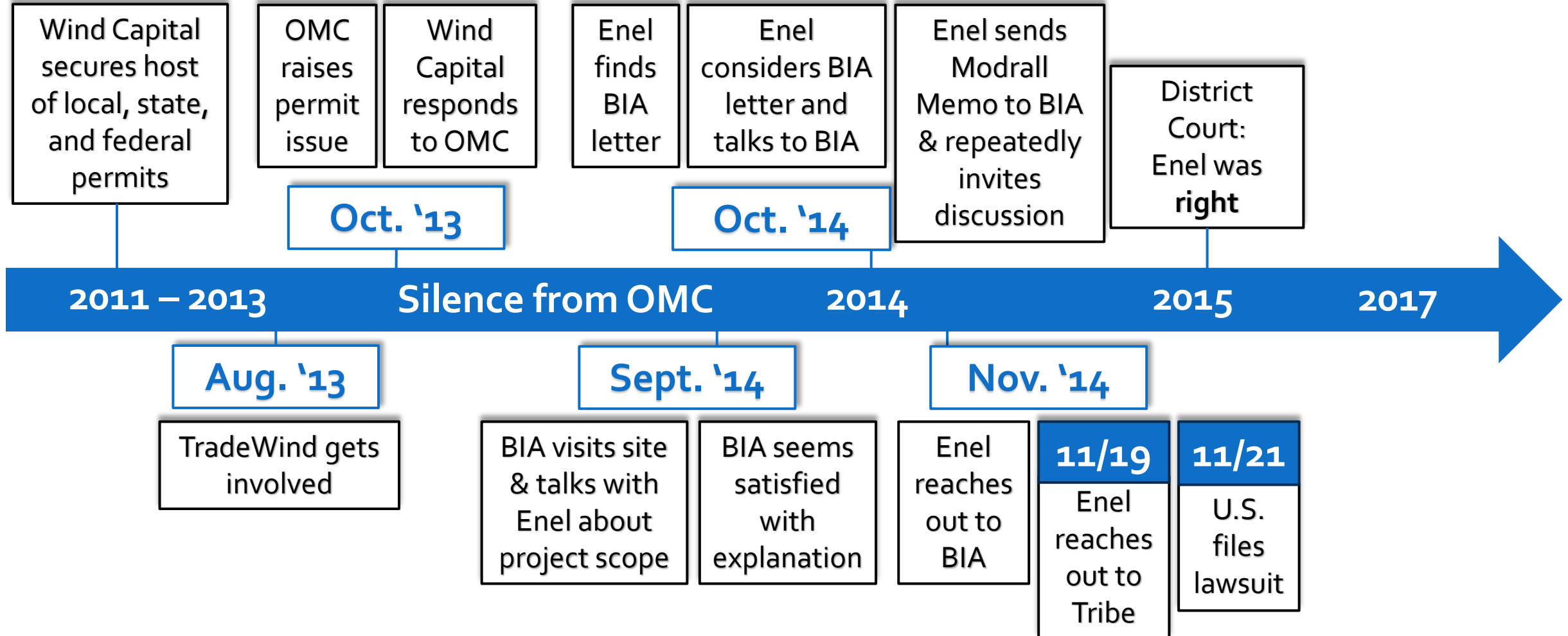
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We believe that this kind of communication is helpful in ensuring that we avoid misunderstandings and, more importantly, that we better understand each other's concerns and objectives in ways that can help us find common ground. This kind of communication will help ensure that projects like Osage Wind are constructed in harmony with local interests and the environment.

Sincerely,

Stephen Pike
Vice President, Operations & Maintenance
Enel Green Power North America, Inc.

DX 25



Enel Reasonably Believed No Mining Lease Required

Modrall 2014 Memo (DX49):

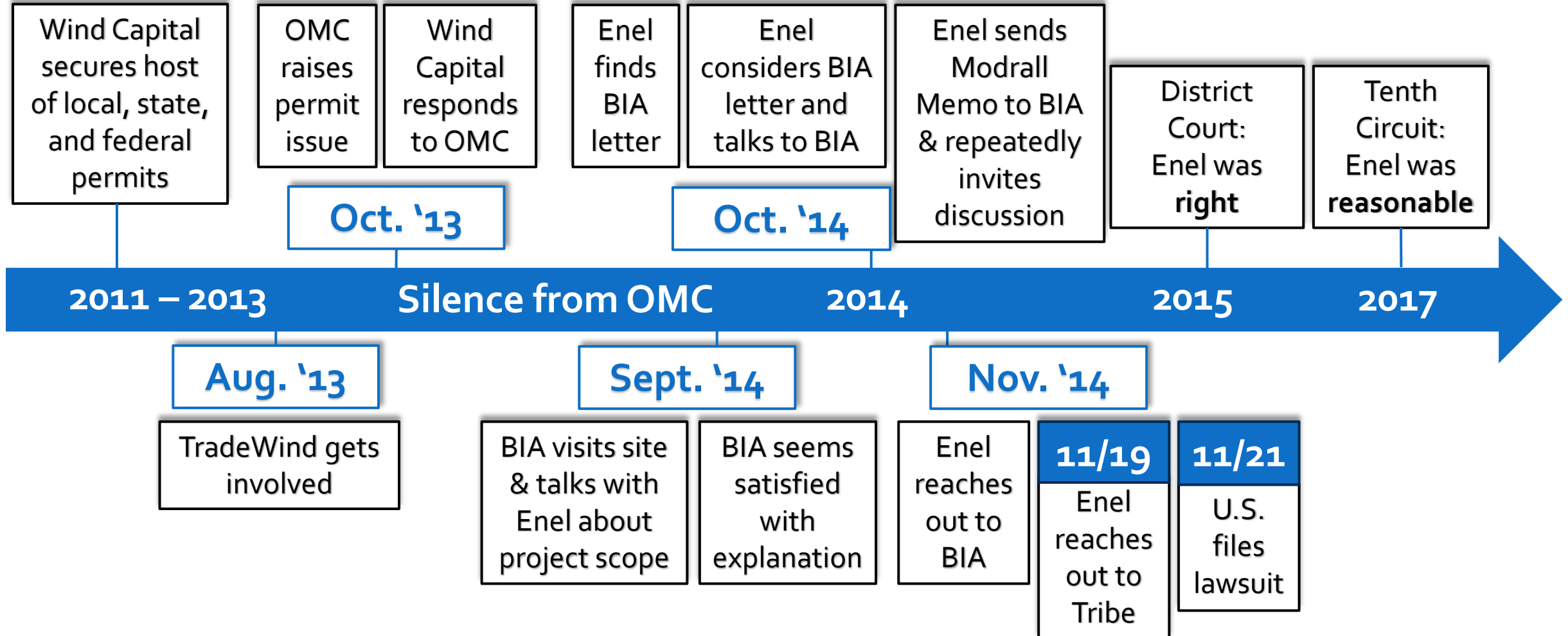
- “Trade Wind, however, does not intend to conduct mining. To the extent any soil or other subsurface material would be moved by Trade Wind, it would be *merely incidental to Trade Wind’s construction of its approved wind farm*.

Judge Payne in 2015:

- “[I]t is clear to the Court that ‘mineral development’ covers the activities of an entity engaged in the science, technique, and business of *developing minerals*, not those of an entity that *incidentally encounters minerals in connection with surface construction activities*.”

Enel Reasonably Believed No Mining Lease Required

- The Tenth Circuit rejected any claim that a “Sandy Soil” permit was required.
- The Tenth Circuit held that the applicable regulation was at best “ambiguous,” and that Enel’s interpretation was “reasonable.”



Plaintiffs' Red Herrings

- **Lacking evidence of malice or bad faith, Plaintiffs claim Enel:**
 - × **Withheld facts from its attorneys**
 - × **Continued construction solely to save money**
 - × **Disregarded BIA's claim about a "Sandy Soil" permit**
 - × **Didn't record volume of rock excavated**

Enel Did Not Withhold Facts From Its Attorneys

698

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE NORTHERN DISTRICT OF OKLAHOMA

3

4 UNITED STATES OF AMERICA,)

5 Plaintiff,)

6 and)

7 OSAGE MINERALS COUNCIL,)

8 Plaintiff-Intervenor,)

9 vs.) CASE NO. 4:14-CV-704-JCG-JFJ

10 OSAGE WIND, LLC,)

11 ENEL KANSAS, LLC, AND)

12 ENEL GREEN POWER NORTH)

13 AMERICA, INC.,)

14 Defendants.)

15 TRANSCRIPT OF PROCEEDINGS

16 MAY 23, 2024

17 BEFORE THE HONORABLE JENNIFER CHOE-GROVES

18 UNITED STATES DISTRICT JUDGE

19 BENCH TRIAL - VOLUME VII, A.M. SESSION

20

21 A P P E A R A N C E S

22

23 MR. NOLAN FIELDS and MS. CATHRYN DAWN MCCLANAHAN,

24 Assistant United States Attorneys, Northern District of

25 Oklahoma, United States Attorney's Office, 110 West 7th Street,

Suite 300, Tulsa, Oklahoma 74119, appeared on behalf of the

plaintiff.

MR. STUART P. ASHWORTH, Department of the Interior, Office

of the Solicitor, 7906 East 33rd Street, Suite 100, Tulsa,

Oklahoma 74145, appeared on behalf of the plaintiff.

US DISTRICT COURT - NDOK

REPORTED BY: LESLIE K. RUIZ, OK-CSR, RPR, RMR

9	Q	(By Mr. Ashworth) Sir, did your clients tell you what the
10		methods of excavation would have been for solid material?
11	A	What we heard was that they would use customary
12		excavation and construction processes.
13	Q	What was your understanding of that?
14	A	My understanding was that they would excavate using
15		whatever material or equipment is appropriate for this kind of
16		construction and then would return that same material to the
17		site from which it'd been -- it had been removed.

Tr. 739:9-17 (Slade)

Enel Did Not Withhold Facts From Its Attorneys

Memorandum



To: Bill Scott
From: Sarah Stevenson
Date: October 31, 2013
Re: Rights of surface owners to use soil

Question Presented

Whether a surface owner who excavates land for surface rights—and does not remove the land excavated from the mineral estate and requires a mining permit.

The Osage mineral estate

In *Osage Nation v. Irby*, 597 F.3d 1117, 1120-21 (10th Cir. 2010), the court provided the following relevant history of the Osage Nation:

In 1872, Congress established a reservation for the Grent and Little Osage Indians in Oklahoma. See Act of June 5, 1872, ch. 310, 17 Stat. 335. The reservation was increased in size by the Indian General Allotment Act of 1887, ch. 11, § 2, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 333, 335, 381). The Osage reservation was expressly extended to the new state of Oklahoma in 1906. See Act of June 16, 1906, ch. 3335, 34 Stat. 267, §§ 2, 21, and 22. “The Osage Indian Reservation with its present boundaries to be known as Osage County.” Osage County covers about 2,250 square miles (about 3% of Oklahoma).

Contemporaneous to passing the Oklahoma Mineral Land Act, the Osage Allotment Act. See Act of June 28, 1906, ch. 3572, 34 Stat. 539. The Allotment Act severed the mineral estate from the surface land in trust for the tribe. *Id.* at §§ 2-3. . . . The surface land in severalty to tribal members. Osage Act of June 5, 1872, ch. 310, 17 Stat. 335 (An Act to provide for the allotment of land to the Indians a Reservation in the Indian Territory) does not mention the mineral estate.

The Osage Allotment Act, Sec. 2, Seventh, Act of June 28, 1906, ch. 3572, 34 Stat. 539, provides that “nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided; *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.” Section 3 of the Osage Allotment Act further provides that “the oil, gas, coal or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April [1906]; and leases for all oil, gas, and other minerals, covered by selections and division of land herein provided for, may be made by the Osage tribe of Indians, through its tribal council, and with the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe *And Provided further*, That no mining or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior” Section 11 of the Osage Allotment Act provides for lands for railroad purposes, “*Provided*, That such railroad companies shall not take or acquire hereby any right or title to any oil, gas, or other mineral in any of said lands.”

The Osage Nation’s Constitution declares authority over the Osage Mineral Estate, defined as the “oil, gas, coal, and/or other minerals within the boundaries of the Osage Reservation . . . reserved to the Osage Nation pursuant to the Act of June 28, 1906 (34 Stat. 539), as amended.” Art. XV, Sec. 2.

25 C.F.R. Part 226 contains regulations for gas mining.” 25 C.F.R. Part 214 contains regulations for mining, except oil and gas, on whether surface use, consistent with the lease or lease is needed.

Analysis

The Osage Tribe has indicated that the excavation and construction, of the Osage’s mineral estate.

Trade Winds’ construction of the wind farm on the Osage Nation. While there is no controlling authority, because Trade Winds is not engaging in mining, consistent *only* with its lease.

Trade Winds does not dispute that the Lease does not provide it with a right to conduct mining or other mineral extraction. Trade Winds, however, is not conducting mining. To the extent any soil or other subsurface material is (touched) by Trade Winds, it is merely incidental to Trade Winds’ construction of its approved wind farm. No soil is removed from the site, or processed on site for a commercial use.

The Federal Regulations implementing the Indian Mineral Lands Act CITE governing the leasing of Tribal lands for mineral development defining “mining” as follows:

2

OSAGE WIND PRIV-000415

DX48, page 5 of 10

OSAGE WIND PRIV-000414

DX48, page 4 of 10

From: Sarah Stevenson
Date: October 31, 2013
Re: Rights of surface owners to use soil

Trade Winds does not dispute that the Lease does not provide it with a right to conduct mining or other mineral extraction. Trade Winds, however, is not conducting mining. To the extent any soil or other subsurface material is (touched) by Trade Winds, it is merely incidental to Trade Winds’ construction of its approved wind farm. No soil is removed from the site, or processed on site for a commercial use.

DX 48 at 5

Enel Did Not Withhold Facts From Its Attorneys

831

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA

3

4 UNITED STATES OF AMERICA,)
5 Plaintiff,)
6 and OSAGE MINERALS COUNCIL,)
7 Plaintiffs - Intervenor,)
8 vs) No. 14-CV-704-JCG-JFJ
9 OSAGE WIND, LLC; ENEL KANSAS,)
10 LLC; and ENEL GREEN POWER)
11 NORTH AMERICA, INC.,)
12 DEFENDANTS.)

13 TRANSCRIPT OF PROCEEDINGS
14 MAY 23, 2024
15 BEFORE THE HONORABLE JENNIFER CHOE-GROVES
16 UNITED STATES DISTRICT JUDGE
17 BENCH TRIAL - VOLUME VIII, P.M. SESSION

18
19
20
21
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23

24 REPORTED BY: Laura Griffin, RPR, CRR, RMR, United States Court Reporter
25 laura_griffin@oknd.uscourts.gov, 918-699-4879

United States District Court

17 Q. Now, in this memorandum, what was your understanding and
18 intent in the use of the word soil?

19 A. My understanding of the use of soil was sort of a term to
20 encompass everything that would come out of the excavated
21 holes. I notice in the sentence before it says soil or other
22 subsurface material. I think those are essentially
23 synonymous.

24 Q. So any time the word soil is used in this memorandum,
25 would it be consistent with that understanding?

1 A. Yes, whatever comes out of the hole.

Tr. 895:12–896:1 (Slade)

Enel Did Not Withhold Facts From Its Attorneys

831

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,)
and OSAGE MINERALS COUNCIL,)
Plaintiffs - Intervenor,)
vs) No. 14-CV-704-JCG-JFJ
OSAGE WIND, LLC; ENEL KANSAS,)
LLC; and ENEL GREEN POWER)
NORTH AMERICA, INC.,)
DEFENDANTS.)

TRANSCRIPT OF PROCEEDINGS

MAY 23, 2024

BEFORE THE HONORABLE JENNIFER CHOE-GROVES

UNITED STATES DISTRICT JUDGE

BENCH TRIAL - VOLUME VIII, P.M. SESSION

REPORTED BY: Laura Griffin, RPR, CRR, RMR, United States Court Reporter

laura_griffin@oknd.uscourts.gov, 918-699-4879

United States District Court

12 Q. And knowing everything that you know now, would knowledge
13 of blasting affect the core conclusion that you reached here?
14 A. No, it would not have. It would have been, in my
15 understanding, it's simply another form of excavation when one
16 reaches a harder rock underlying the surface estate.

Tr. 929:12–16 (Slade)

Plaintiffs' Red Herrings

- Lacking evidence of malice or bad faith, Plaintiffs claim Enel:
 - × ~~Withheld facts from its attorneys~~
 - × Continued construction solely to save money

Cost/Delay Was Not the Driving Factor In Decision To Continue Construction

To: Vagliasindi Vittorio (REN-E&C)(vittorio.vagliasindi@enel.com); Rossini Luca (REN-E&C)(luca.rossini@enel.com); Luigi Lapegna (REN-E&C)(luigi.lapegna@enel.com); Magrini Umberto (REN-E&C)(umberto.magrini@enel.com)
Cc: Parisi Luigi (REN-E&C)(luigi.parisi@enel.com); Lazzarotto Alessandro (REN-E&C)(alessandro.lazzarotto@enel.com); Giuseppe Dimarzio (REN-E&C)(giuseppe.dimarzio@enel.com); Moskaluk Bill (EGP North America)(Bill.Moskaluk@enel.com); Adams, Ryan (EGP North America)(Ryan.Adams@enel.com)
From: Price, Bill (EGP North America)
Sent: Mon 10/20/2014 5:45:35 PM
Subject: Osage letter from the BIA
[20141019_Osage_BIA letter.pdf](#)

Vittorio/Luigi,
So you are aware of the situation at Osage, last week we just received a letter from the Bureau of Indian Affairs (BIA) addressed to Francisco Venturini that basically asked us to stop construction activities until we have a "Sandy Soil Permit".

From our investigation this permit is required only if mining material is done on the Project in which we are not doing. Mining means the removal of rock/material for the sale or use outside of the Project. What we are doing is excavation of the WTG foundations and some of the foundations require blasting. The large rocks are then crushed and used for backfill. The BIA doesn't state the basis for their claim on why the project needs the Sandy Soil Permit, but the letter mentions our rock crushing activities in connection with the foundation excavation work.

In our discussion with the BIA over the last three years and they have never mentioned the need for this Sandy Soil Permit until last week. As you may recall, the Project was heavily challenged by the Osage Indian tribe and it is our view this is another roadblock tactic they are trying to stop the Project.

Here is our overall EGPNA action plan for the Letter:

- **Contacting BIA:** Our external legal counsel (with expertise in this type of situation) is in contact with the BIA's counsel and, if needed, may prepare a response letter to the BIA letter explaining why we don't need this permit.
- **Government Education:** Regulatory Affairs (Headed by Jack Thirloff) is contacting the Eastern office of the BIA to get a better picture of what the exact arguments are and - in the meantime - educating relevant Federal and State officials and preparing them for potential request for assistance.
- **Communication:** External Relations Communications (Michaela De Gennaro) is working on a communication plan to address potential media coverage and has kept her Colleagues in Rome aware of the situation so they are not caught by surprise.
- **Compliance:** Regulatory Compliance - permitting (Joan Heredia) is reaching out to members of the BIA and Osage to more fully understand their position on the Permit and if a permit is required what the process will entail.
- **Engineering and Construction:** We have been assessing how stopping construction affects the project and what activities we can do to comply with the order. It seems the primary concern is associated with the rock crushing. If our efforts to educate and clear up the issue are not immediately effective, we can stop crushing temporarily. We can then either crush the rock later. If this is a long term stoppage, we can then bring in other material for backfill. This will add cost to the Project but we think it can be managed.

Defendants' Exhibits
DX12

OSAGE WIND-019010

DX12, page 1 of 3

OSAGE WIND-019011

DX12, page 2 of 3

From: Price, Bill (EGP North America)
Sent: Mon 10/20/2014 5:45:35 PM
Subject: Osage letter from the BIA

Vittorio/Luigi,

So you are aware of the situation at Osage, last week we just received a letter from the Bureau of Indian Affairs (BIA) addressed to Francisco Venturini that basically asked us to stop construction activities until we have a "Sandy Soil Permit".

From our investigation this permit is required only if mining material is done on the Project in which we are not doing. Mining means the removal of rock/material for the sale or use outside of the Project. What we are doing is excavation of the WTG foundations and some of the foundations require blasting. The large rocks are then crushed and used for backfill. The BIA doesn't state the basis for their claim on why the project needs the Sandy Soil Permit, but the letter mentions our rock crushing activities in connection with the foundation excavation work.

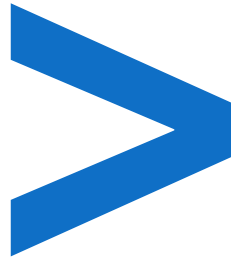
- **Engineering and Construction:** We have been assessing how stopping construction affects the project and what activities we can do to comply with the order. It seems the primary concern is associated with the rock crushing. If our efforts to educate and clear up the issue are not immediately effective, we can stop crushing temporarily. We can then either crush the rock later. If this is a long term stoppage, we can then bring in other material for backfill. This will add cost to the Project but we think it can be managed.

DX 12

Enel's Use of OME as Backfill Cost More than Using Replacement Backfill

Cost of Rock Crushing:

- \$25,863 per site
- 82 sites crushed
- $\$25,863 \times 82 = \mathbf{\$2,120,766}$



Cost of Replacement Backfill:

- \$23,148 per turbine
- 84 turbines sites
- $23,148 \times 84 \text{ sites} = \mathbf{\$1,944,432}$

PX 31 at 4; PX 37

Enel Witnesses Confirmed The Decision to Continue Construction Was Based on Legal Advice That No Permit Was Needed

- Enel's decision to continue construction was "first based on [Modrall's] legal conclusion that a permit was not required." Tr. 841:6–842:21 ([Slade](#)).
- "[B]ased on our discussions with the team and our legal staff, we determined [a "Sandy Soil Permit"] wasn't necessary." Tr. 1448:6–18 ([Price](#)).
- "[W]e had the benefit of the Modrall work and believed that we were not doing anything that would trigger the need for...the permit or the lease." Tr. 654:4–16 ([Storch](#)).

Plaintiffs' Red Herrings

- Lacking evidence of malice or bad faith, Plaintiffs claim Enel:
 - × ~~Withheld facts from its attorneys~~
 - × ~~Continued construction solely to save money~~
 - × Disregarded BIA's claim about a "Sandy Soil" permit

“Sandy Soil Permit” Did Not Apply

OMC points to no agency interpretation, informal guidance document, adjudicatory decision, or anything else that explains or even mentions the Sandy Soil Lease other than negotiation letters involving ODOT’s contractor, and the lease document itself.

Thus, we cannot say that DOI’s Sandy Soil Lease requirement for mere surface construction has the power to persuade.

United States v. Osage Wind, 871 F.3d 1078, 1088 (10th Cir. 2017)

Plaintiffs' Red Herrings

- Lacking evidence of malice or bad faith, Plaintiffs claim Enel:
 - × ~~Withheld facts from its attorneys~~
 - × ~~Continued construction solely to save money~~
 - × ~~Disregarded BIA's claim about a "Sandy Soil" permit~~
 - × Didn't record volume of rock excavated

Recording of Volume of Rock Excavated

- Enel's intent at the time of the trespass—not in subsequent litigation—is what matters.
- Not keeping such records was consistent both with the construction contract and Enel's standard practice.

Plaintiffs' Red Herrings

- Lacking evidence of malice or bad faith, Plaintiffs claim Enel:
 - × ~~Withheld facts from its attorneys~~
 - × ~~Continued construction solely to save money~~
 - × ~~Disregarded BIA's claim about a "Sandy Soil" permit~~
 - × ~~Didn't record volume of rock excavated~~

No Basis for Treble Damages

Plaintiffs must prove that Enel:

- 1 acted with “malice” or bad faith; and
- 2 dispossessed Plaintiffs from “real property” with “violence” or “active force.”

23 Okla. Stat. § 71. Forcible Exclusion From Real Property

“For *forcibly ejecting or excluding a person from the possession of real property*, the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of.”

Plaintiffs Trying To Rewrite Section 71

“For forcibly ejecting or excluding ~~a person from the possession of~~ real property, the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of.”

Crow v. Davidson, 96 P.2d 70 (Okla. 1939)

“The term forcibly ejected or excluded has been construed in similar statutes to mean ***force of an unusual kind*** which ***tends to bring about a breach of the peace***, such as an ***injury with a strong arm***, or a ***multitude of people***, or in a ***riotous manner***, or with ***personal violence***, or with ***threat or menace to life or limb***, or under ***circumstances which would naturally inspire fear***.”

Id. at 72 (emphasis added)

No Dispossession with “Violence” or “Active Force”

There is **no evidence** that:

- Enel attempted by force to remove OMC from the premises, **or**
- Enel’s organized, scheduled construction process involved “violent,” “riotous,” “unusual,” or “threatening” force that would “naturally inspire fear.”

No Dispossession with “Violence” or “Active Force”

Enel’s use of blasting was:

- Controlled, routine, and conducted in a manner typical of similar projects.
- Not itself a trespass and did not remove Plaintiffs from the premises or eject Plaintiffs from anything.
- Consistent with Enel’s rights to the surface estate.

No Dispossession with “Violence” or “Active Force”

Undisputed that rock blasting is customary and typical:

- “It's very common to use blasting.” Tr. 1398:12 – 18 (Price).
- “[B]lasting is very common.” Tr. 460:16–25 (Storch).
- “[B]lasting” is “simply another form of excavation when one reaches a harder rock underlying the surface estate.” Tr. 929:12–16 (Slade).

Did Plaintiffs prove that—when the trespass occurred in 2014—Enel acted with the **violence** and **bad faith** needed to justify an **unusual award** of treble damages?

YES ☐

NO ☒